IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 11 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KANBI KALYANJI POPAT

Versus

KANBI MOHANLAL RAVJI

Appearance:

MR AMAR D. MITHANI for MR PM RAVAL, learned Advocate for Appellant

MR RE VARIAVA for MR DD VYAS, learned advocate for Respondent

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 25/11/98

ORAL JUDGEMENT

Being aggrieved by the judgment and decree dt. 3rd October, 1980 passed by the then learned District Judge at Jamnagar, in Regular Civil Appeal No.95 of 1998 on his File, dismissing the same and confirming the judgment and decree passed by the then learned Civil Judge (Junior Division), Bhanvad-Jam Jodhpur on 26th September, 1978 in Regular Civil Suit No.11 of 1976, declaring that the new door opened by the appellant in

his wall is illegal, and granting mandatory injunction directing the appellant to remove the door and restore the position that stood prior to the door was opened, the original defendant has filed this appeal.

2. The facts which led the appellant to prefer the appeal may, in brief, be stated. It may be mentioned before I proceed that the appellant is the original defendant and the respondent is the original plaintiff in the suit. For the purpose of convenience, I will refer the parties to their original status in the suit. The plaintiff is having his house facing north within the local limits of Saidevaliya situated in Bhanvad Taluka of Jamnagar District. On the west of his house, the house of the defendant is situated. It is also facing north. On the back of the houses of the parties, there is an open land admeasuring 55 ft. x 4 ft. On the eastern side of the plaintiff's house, there is a public road (north to south). Likewise, on the western side of the defendant's house, there is also a public road (north to south). There are two doors in the back wall of the plaintiffs' house and there are about six windows (apertures) in the back wall of the defendant's house. There was no door in the back wall of the defendant's house. The plaintiff was using the land touching the southern wall of his house as well as the house of the defendant (hereinafter referred to as the suit land). On both the ends of the suit land, (eastern and western), there are Frames of the doors. The plaintiff is using the suit land for the purpose of ingress and egress from the back since long. The defendant, according to the plaintiff, is having no right to pass and repass by the suit land, but few days prior to the date of the suit, the defendant opened the door in his back wall i.e. southern wall, so as to have ingress and egress through the suit land. The plaintiff found that by opening of the new door, the defendant had created his right disturbing his peaceful enjoyment. Even his privacy was also impaired. He, therefore, filed the suit in the Court of the Civil Judge (Junior Division), Bhanvad- Jam Jodhpur for a permanent injunction restraining the defendant from making use of the door he had opened, and also for a declaration, that the act of opening the door was without having any right in law.

3. The defendant -appellant, on being served with the summons, appeared before the lower court and filed his written statement (Ex.16) denying the allegations levelled against him in the plaint, and further contending that the suit land known as Chawl did not belong to the plaintiff. It was the Government land and

was being used by the public for the purpose of passing and repassing. He opened the door on 22nd March, 1976 taking necessary permission from the Gram Panchayat. When he opened the door, he was not prevented by the plaintiff. The plaintiff got the doors fixed in the Frames situated on both sides of the suit land namely eastern and western sides, and started to hasfe the door from inside, with the result, it was difficult for him to make the use of the suit land. He had also a right to take light and air through that door, and the plaintiff had no right whatsoever to obstruct him in the enjoyment of such right.

4. The learned Civil Judge framed necessary Issues at Ex.42. Appreciating the evidence led before him, he held that the suit land was owned by the plaintiff, and as such, the plaintiff was in possession thereof. He also held that the defendant had no right to use the suit land. The defendant opened the door in his back wall without any right. The suit land was not the public way as alleged by the defendant and was also neither the Government land, nor Panchayat land. He, therefore, passed the decree as prayed for on 26th September, 1978. The appellant then preferred Regular Civil Appeal No.95 of 1978 in the District Court at Jamnagar. The then learned District Judge upheld the judgment and decree passed by the learned Civil Judge (J.D.) and dismissed the appeal holding that the defendant was having no right to open the door in his back wall and the suit land was neither the Government land, nor the Panchayat land. It is against that judgment and decree, the present appeal is filed.

5. This being the Second Appeal, at the time of admission, the following questions were formulated for consideration :-

(1) Whether the plaintiff, who could not establish his title to the land, can succeed on weakness of defence.

(2) Whether, plaintiff can claim right over property as an owner on that part adjoining to the property of the defendant but beyond his own.

(3) Whether the mandatory injunction to close down the door in own wall can be issued against a party.

6. Before I deal with the questions raised, better it would be to deal the preliminary point raised by the

otherside. It is contended that in view of Sec.100 Civil Procedure Code, my scope being limited, it would not be just and proper to dissect the merits of rival cases relating to fact. The Court can deal with substantial question of law. In the appeal findings of facts are assailed and questions formulated can never be termed substantial question of law. About the scope of inquiry in Second Appeal, both the learned advocates have cited the decisions which I will be referring now.

7. In the case of Anilkumar Vs. Sunita 1997(2) G.L.H. 533, the question about scope of inquiry of this court under Sec.100 C.P.Code, 1908 arose, wherein it is made clear that Second Appeal is competent on a "substantial question of law". The findings of facts recorded by the lower court have not to be interfered with unless and until illegality and manifest perversity or misconstruction or misreading is successfully pointed out. Sec.100 C.P.Code does not empower this court to upset any finding of fact, although it may appear erroneous on appreciation of evidence on record, unless it is shown or found to be perverse.

8. The Supreme Court, in the case of Karbalai Bugum Vs. Mohd. Sayeed and another, AIR 1981 SUPREME COURT 77 has also made it clear that the High Court should not interfere with the finding of fact given by the lower court in Second Appeal under Sec.100 C.P.Code. In another case of Kishanlal Biharilal Maheshwari and others Vs. Ramrao Hanumant Rao Patil and another, AIR 1981 SUPREME COUR 1183, the principle is reiterated holding that if there is no error of law, the jurisdiction of the High Court in Second Appeal under Sec.100 C.P.Code cannot be invoked. Again the Supreme Court, in the case of Bholaram Vs. Ameerchand, AIR 1981 SUPREME COURT, 1209, found that the High Court, hearing both on law and facts erred in interfering with the judgments of the courts below in Second Appeal and holding different view than what both the courts below have taken. In the case of Panchugopal Barua & Ors. Vs. Umesh Chandra Goswami & Ors. JT 1997(2) S.C.554 relating to Sec.100 C.P.Code, it is made clear that the High Court overlooked the change brought about in Section 100 C.P.Code in 1976 and ignored that existence of a "substantial question of law" is since qua non for exercise of jurisdiction under Sec.100 C.P.Code and if substantial questions of law are not formulated, it would amount to breach of Sec.100 C.P.Code. In the case of Kshitish Chandra Purkait Vs. Santosh Kumar Purkait & Ors. JT 1997 (5) S.C.202, what is made clear is that in Second Appeal, Under Sec.100 C.P.Code, substantial question of law can be raised and

not every question. This Court, when similar question raised in the case of SOLANKI LAXMANSING KESARISING vs. STATE OF GUJARAT, 35(2) [1994(2)] G.L.R. 1294, held that Second Appeal under Sec.100 of C.P.Code is competent only on the ground of error of law or procedure and not on the ground of an error of a question of fact. Where the findings of the courts below are based on a proper appreciation of the evidence, no interference can be made in the Second Appeal. Again this court, in the case of Bai Chanchal wd/o Gandhabhai Shridharbhai & Ors. Vs. Darji Shankerlal Shanalal & Anr. 35(1) [1994(1)] G.L.R. 262 made it clear that in Second Appeal under Sec.100 C.P.Code, a finding of fact however erroneous may be, should not be upset, unless it is shown to be perverse, and in which case, finding can be said perverse, is also made clear stating that the finding can be perverse, if it is passed on no evidence or it is based on misreading of evidence or it is contrary to the evidence on record or it is such as would not be recorded by any prudent person on the basis of the evidence on record. When such question often raised, this court thought it fit to elucidate in detail about scope of the inquiry in the Second Appeal under Sec.100 C.P.Code. In the case of Koli Jiva Gaga Vs. Koli Ravji Chugha, 1996(3) GCD 1 (Guj), it is held that the maintainability of Second Appeal under Sec.100 C.P. Code depends on satisfaction of High Court that the case involves a substantial question of law, and it is more so because after the amendment in the Code, Sub Sec.(4) & (5) to Sec. 100 came to be introduced. What is substantial question of law is not defined by the parliament but very change in the language is suggestive of the fact that the parliament never intended that the Second Appeal shall lie as a matter of course or on any of the grounds on which the Second Appeals were entertained under clause (a)((b) and (c) of the old Section 100 C.P.Code. The expression "substantial question of law" is not defined. The scope or meaning thereof can be said to have advisedly left to the judicial wisdom and discretion as to how and when the Second Appeal can be said to involve a substantial question of law. No straitjacket formula can be laid down or that expression cannot be confined to a different clauses or cases only. The question which requires the second appellate court to decide the question of fact or facts or to record its findings on question of facts based on retrial or reappraisal of evidence can never be said to be a question of law. When the expression "substantial question of law" is not defined by the Parliament, the court in his sound wisdom should avoid to draft or articulate a definition. In the case of District Panchayat, Junagadh Vs. Manharlal

Mulchand Gandhi & Anr. 1994(1) GCD 642 (Guj), it is held that the jurisdiction under Sec.100 C.P.Code is circumscribed. The court would not be entitled to interfere with concurrent findings of facts arrived at by both the courts below, unless and until a substantial question of law is emerging and pointed out successfully. When similar question arose in the case of Ismail Nathabhai Khatri Vs. Muljibhai Shankerbhai Brahmabhatt, 33(2), 1992(2) GLR 1543, it is made clear that the High Court can not interfere in the Second Appeal under Sec.100 C.P.Code, unless it is shown that finding of fact is totally and manifestly erroneous, perverse and indicating misreading or non-application of mind is successfully pointed out. Similar view is also taken by this court in the case of BARODA MUNICIPAL CORPORATION vs. GUNJAN TRADERS & ANOTHER, 1992(1) G.L.H. 34. In the case of J.B.Sharma Vs. State of Madhya Pradesh and another, AIR 1988 SUPREME COURT 703, it is made clear that the High Court would be justified in setting aside the findings in Second Appeal unnder Sec.100 C.P.Code, provided it is found that the lower appellate court passed the decree on assumption not supported by evidence and without considering entire evidence.

9. The sum and substance of these decisions about scope of inquiry in Second Appeal, in view of Sec.100 C.P.Code, is limited. If it is found that both the courts below have ignored the weight of preponderating circumstances and allowed that judgment to be influenced by in consequential matters, the High Court would be justified in reappreciating the evidence and in coming to its own independent conclusion. Unless there is in other words substantial question of law involved in the second appeal, the same is not competent. Regarding finding of fact, the second appeal under Sec.100 C.P.Code will not be competent, even if the finding is erroneous, unless it is shown that it is manifestly perverse, or a result of misconstruction or misreading of evidence, or a result of no evidence. What is perverse is also made clear by this court in the case of Bai Chanchal (supra). In this case, therefore, substantial question will have to be dealt with and no other question of law or facts sought to be raised by the learned advocate representing the defendant.

10. At this stage, the learned advocate representing the defendant contends that it would be open to the defendant to raise a question of law, though it may not be substantial question of law because when the suit was filed, Sec.100 C.P.Code was not amended, and under that old Code, it was permitted to raise any question of law,

although not substantial. The questions in this case raised, can be considered though the same may not appear to be the substantial question of law. In support of his such contention, he draws my attention to the decision of the Supreme Court in the case of Mukund Deo (Dead) represented by his legal representatives Kasibai and others Vs. Mahadu and others, AIR 1965 Supreme Court 703, wherein it is laid down that as a general rule, if the law of procedure is amended, the same would be retrospective, but a right of appeal to a particular forum is a substantive right and is not lost by alteration in the law, unless provision is made expressly in that behalf, or a necessary implication arises. My attention was also drawn to another decision of Punjab High Court in the case of Gurbinder Singh and others Vs. Lal Singh and others, AIR 1959 PUNJAB 123, wherein it is laid down that a right of an appeal is a substantive right and accrues at the time of institution of a suit. If the procedural Code is amended or new Code is brought into force, the second appeal arising out of a suit instituted prior to it, would be governed by the law in force on the day of the suit in each case. The law thus made clear is that the right to appeal is a substantive right and is not a procedural matter. The right to appeal to any superior court is, therefore, governed by the law prevalent on the day of the institution of the suit and not by the law prevailing on the date of the decision or on the date of filing of the appeal, provided, of course, no provision in the Amending Act or a new Act is made giving effect otherwise retrospectively and curtailing the right to appeal. It would, therefore, be necessary to note whether any provision to the contrary is made in the "Amendment Act 1976", whereby several provisions of Civil Procedure Code came to be amended. Sec.97(n) of the Amendment Act, 1976 which is a repealing and saving provision provides that the provision of the new Sec.100 C.P.Code shall not apply or effect any appeal from the appellate decree or order which has been admitted before the date of the enforcement after hearing under O. 41 R.11 of Civil Procedure Code, and that every such appeal admitted prior to the amendment came into force shall be dealt with as if new Sec.100 Civil Procedure Code had not come into force. The amended provision will apply, if the suit is filed after amended Code came into force. It is pertinent to note that the amendment in Civil Procedure Code came into force from 1st February 1977. The present appeal is filed subsequent to the date when the amended provision of Sec.100 came into force. When that is the case, in view of the above stated Sec.97(n) of the Amending Act, the second appeal shall be governed by the

new section 100 and not by the old one as contended.

11. I will now deal with the questions formulated for consideration. It may be stated that the right and obligation of both the parties in this case hinges on the ownership of the suit land, and right acquired thereof. The plaintiff has come out with the case that he is the owner of the suit land and no one has any right, title or interest therein. Against such case, the defendant has come out with the case in defence that the suit land is not owned by the plaintiff, but it is the Ravli land (Government land) namely either belonging to the Government or the Panchayat. On this question, both the Courts have appreciated the evidence on record in right perspective. I have gone through the judgments rendered by both the courts below and I do not find any reason to hold that the courts below have either misconstructed the evidence or misread the evidence or perversely interpreted the same, or finding is given contrary to the evidence on record or on the basis of inferences and conjectures. When the question involves regarding ownership of the land, it would not be just and proper on my part to dissect the merit, because it is a pure question of fact and not substantial question of law. The learned advocate representing the appellant, therefore, contends that the legal aspect of the point would be to determine whether on the basis of weakness in defence, the court can jump to the conclusion that the case of the plaintiff is acceptable. He has so contended because according to him, both the courts below have concentrated on the defence raised by the defendant alleging that the suit land is the Ravli land and not the land owned by the plaintiff. In that connection, both the courts have no doubt gone into details and have held as if no evidence, though available, is led but the suit land cannot be held to be the Government land. The map is not produced or necessary record from City Survey Office is also not produced. A person from the Panchayat with necessary record is also not examined, except producing a copy of the Village Form 13 at Ex.80. Both the courts below have attached no value to Ex.80 and rightly so because, it being an extract from the Census Register called Village Form No.13, any entry made therein, neither creates any title nor negatives the same. The oral evidence on the facts has been rightly examined & dissected, but it seems that the learned advocate representing the appellant has misread the judgment of the lower appellate court. The lower appellate court has not reached its conclusion on the fact that when the defendant failed to establish the case, he has alleged in defence about ownership of the

land, the same would automatically belong to the plaintiff. The evidence led by the plaintiff and also the defendant is considered and on the basis of emerging cumulative fact thereof, both the courts below have reached the conclusion that the land belongs to the plaintiff. True, the plaintiff has not produced any documentary evidence except Ex.80 the Village Form 13 referred to hereinabove which is not the document of title as the entry posted in Census Register neither creates title nor negatives the same, but it cannot be said that there is no evidence at all on record and sheer on the basis of the inferences and conjectures, both the courts below have reached the particular conclusion in favour of the plaintiff. On both the sides of the suit land namely eastern and western, there are Frames of the Door and the Court Commissioner found the same to be very old. The doors were fixed on 24th March, 1976 and that is the fact emerging out from the evidence of Laxman Haraji- the carpenter, but it can be said, as the frames were old, that formerly the doors were there and by passage of time, they having been decayed, they were either removed or were detached or had fallen off. Long time after, the plaintiff got the doors fixed. At this stage, it may be remembered that there was no door in the back wall of the defendant. The same is opened only few days prior to the date of filing of the suit. There are two old doors in the back wall of the plaintiff. The said fact is not denied by the defendant. Years have passed after the doors in plaintiff's wall were opened and no one has objected. Hence for going into the suit land from the back wall, only the plaintiff was having the passage for ingress and egress. The defendant was never having such passage till he opened disputed door. To avoid entry of third one and to have due protection on both the sides of the land, the doors were fixed, and lateron when the shutters were decayed, new shutters were fixed. It was also because the plaintiff found that by opening of the door by the defendant, his rights were being marred. Such evidence on record goes to show that the plaintiff is the owner of the suit land. If at all, it was Ravli land and the people had a right to pass and repass by that land as alleged, the members of public would not have allowed the plaintiff to put the doors on both the sides of the suit land, and would have raised their objection or protest so as to have their right to pass and repass through the suit land unobstructed. It seems that no objection from the public was raised as the plaintiff alone was having right title & interest in the suit land, and to the exclusion of all others he was going into the suit land by his doors in the back wall. He has been accordingly using it since long and his such

exclusive use is the circumstance on record going to support his say qua ownership, and discredit the truth of the case in defence. It may also be mentioned that long user shows that the suit land is in possession of plff since long without any obstruction. There is no documentary evidence indicating the ownership of the suit land. Long use and possession would, therefore, indicate the ownership. In this case, the defendant has never enjoyed or possessed the same because he was having no access to the suit land for want of door, the courts below, on the basis of such evidence, rightly found that the plaintiff was the owner of the land and the land was not Ravly land as contended by the defendant. In view of the matter, it cannot be said that both the courts below have based their conclusions only on the fact that the defendant failed to prove his case alleged in defence.

12. The houses of the parties are situated touching to each other and in between these two houses, there is a common wall. The width of both houses is the same from east to west. The width of the plaintiff's house is 25' and likewise is the width of the defendant's house. The suit land is 50' in length from east to west. It is, therefore, contended, how the suit land equivalent to the width of the defendant's house in length i.e. western half of the suit land can be the land owned by the plaintiff. At the time of submission, when a query was made, both the learned advocates, reading certain statements made by some of the witnesses, have submitted that formerly both the houses were belonging to one person, and thereafter, the same came to be divided. They, in succession or by buying, have become the owners of their respective houses. The fact that formerly, one person was the owner of both the houses, however, would not necessarily lead to hold that the suit land situated on the back side of their houses towards south , came to be owned by the owners of both the houses, half to half widthwise being adjacent to the houses. Consequently, it cannot be said that eastern half of the suit land belongs to plaintiff and western half belongs to defendant. The fact that there is the door in the back wall of the plaintiff's house is the decisive factor. Right from the beginning as submitted, two doors in the plaintiff's back wall are there, and there was no door at all in the defendant's back wall, but there were six apertures for taking light and air. By the doors in the back wall of the plaintiff's house, former owner of the two houses was using the suit land, and when both the houses came to be divided and lateron came to be owned by the plaintiff and defendant, it is rightly held that the plaintiff, having access from his back door, acquired the ownership of the

whole of the suit land and not half of the land i.e. eastern half. It is also admitted that there is no evidence on record indicating that the defendant was using the half of the suit land i.e. western half adjacent to his back wall through the western door, as he was having no door in the back wall. The evidence on record shows that the plaintiff used to go to the suit land by his two doors in the back wall. When accordingly the use is made since long and the defendant was having no scope to use the land till he opened the door few days before the suit was filed, the ownership of whole of the land found to be of the plaintiff cannot be said to be erroneous or strange as contended by the learned advocate for the defendant.

13. About injunctive relief sought for, the contention of the defendant is that he has a right to make as many openings as he likes in his own wall and the plaintiff cannot come in his way or seek any injunctive relief. If the plaintiff finds that he is having no right to open the door and create any right on the suit land, he can screen the door opened from his side. The courts below, therefore, ought not to have granted the injunctive relief. The contention cannot be accepted because this court has, as back as in 1970, made it clear that in such cases also, injunctive relief can be granted. In the case of Patel Amba Natha Vs. Patel Virji Devji, XI [1970] GLR 1003, it is laid down that the plaintiff has right to take steps to prevent the defendant from putting up the apertures in his property, the continued existence and enjoyment of which may create for him new rights derogatory to the plaintiff's right or adversely affecting them. If the plaintiff has a right to take steps privately to prevent the defendant from acting in a manner prejudicial or derogatory to his rights, he has also the right to have recourse to law to restrain the defendant from doing so. Recourse to law is a more sophisticated and advanced remedy and is intended to bring about just or nearly just solution of disputes between parties without causing disturbance to social order or without up-setting its balance. When accordingly the law is made clear, the injective relief being a sophisticated one can be granted and the plaintiff need not be asked to close the door by raising the screen from his side. The lower courts have, therefore, not fallen into error of law on any of the three questions formulated or on any other issues that arose before the lower court for consideration. I am in general agreement with both the courts below on all the issues. It is, therefore, not necessary to restate the other reasonings, they have given.

14. For the aforesaid reasons, on all the three questions formulated, the defendant fails. The appeal, being devoid of merits, is liable to be dismissed and is accordingly dismissed with costs.

Date: 25/11/1998. --------
(ccshah)